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# Appeals under the Ohio Workmen's Compensation Act

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## Appeals under the Ohio Workmen's Compensation Act

### **Erratum**

PAGE 257, LINE 3: change "has" to "have."

## *Appeals Under the Ohio Workmen's Compensation Act*

WORKMEN'S COMPENSATION is a system of social legislation providing compensation for loss resulting from the disablement or death of workmen through industrial accident, casualty, or occupational disease.<sup>1</sup> The purpose of this type of enactment is to require that injuries to workmen sustained in the course of their employment be regarded as a cost of production. The program provides for the payment of compensation to the injured workman<sup>2</sup> or his dependents in case of death,<sup>3</sup> from a special fund by means of a speedy and inexpensive remedy.<sup>4</sup>

The vast majority of compensation acts throughout the United States provide for appeals both within the administrative agency and to court.<sup>5</sup> Ohio has followed the majority since its first compensation law in 1911.<sup>6</sup> Throughout the years, the appellate procedure under the Ohio act has been amended and changed numerous times. This Note will examine statutes and case law which permit a claimant or an employer to appeal a case within the administrative structure and, under certain circumstances, to court.

### I. BACKGROUND OF THE WORKMEN'S COMPENSATION ACT

The first workmen's compensation act in Ohio, adopted in 1911, provided for a voluntary program. This act was declared constitutional in *State ex rel. Yapple v. Creamer*,<sup>7</sup> when the Ohio Supreme Court held that the plan for aiding injured employees was a valid exercise of the state police power. In 1912, the Ohio Constitution was amended<sup>8</sup> and a section was added which expressly authorized the legislature to enact a compulsory workmen's compensation system. The Ohio Constitution was again amended in 1923 to provide the legislature with broader power to pass legislation

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<sup>1</sup> 58 OHIO JUR. 2d *Workmen's Compensation* § 1 (1963).

<sup>2</sup> *Industrial Comm'n v. Gintert*, 128 Ohio St. 129, 190 N.E. 400 (1934).

<sup>3</sup> *Gwaltney v. General Motors Corp.*, 137 Ohio St. 354, 30 N.E.2d 342 (1940).

<sup>4</sup> *Industrial Comm'n v. Weigandt*, 102 Ohio St. 1, 130 N.E. 38 (1921).

<sup>5</sup> 58 AM. JUR. *Workmen's Compensation* § 522 (1948). But see *State v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957).

<sup>6</sup> 102 Ohio Laws 524 (1911). See 58 OHIO JUR. 2d *Workmen's Compensation* § 2 (1963).

<sup>7</sup> 85 Ohio St. 349, 97 N.E. 602 (1912).

<sup>8</sup> OHIO CONST. art. II, § 35 (1912). See *Fassig v. State ex rel. Turner*, 95 Ohio St. 232, 116 N.E. 104 (1917).

which would fulfill the purpose of workmen's compensation.<sup>9</sup> Pursuant to this authority, the legislature has expressly exempted the functions of the industrial commission from the procedures outlined in the General Administrative Procedure Act<sup>10</sup> and has established a separate procedure for the workmen's compensation program.

Under the Ohio Constitution, the administrative power in the workmen's compensation system is vested in a board<sup>11</sup> which is called the industrial commission. The industrial commission is composed of three members appointed by the governor, with the advice and consent of the senate, to serve for six years.<sup>12</sup> The functions and duties of the commission are defined by statute,<sup>13</sup> including the right to make rules and regulations regarding its procedure.<sup>14</sup>

The administrative duties imposed upon the industrial commission are now vested in the first administrative level known as the bureau of workmen's compensation, headed by the administrator of

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<sup>9</sup> OHIO CONST. art. II, § 35. See *Mabley & Carew Co. v. Lee*, 129 Ohio St. 69, 193 N.E. 745 (1934).

The amendment gave the legislature power to levy compulsory contributions on employers in order to set up a fund for compensation and to determine the terms and conditions upon which payments should be made. In return, the employer was given relief from certain common law and statutory liabilities.

<sup>10</sup> OHIO REV. CODE § 119.01. This statute states that its sections do not apply to actions of the industrial commission under OHIO REV. CODE §§ 4123.01-94. One can only wonder if this also means actions of the administrator or boards of review.

<sup>11</sup> OHIO CONST. art. II, § 35. "Laws may be passed establishing a board which may be empowered to classify all occupations . . . and to determine all rights of claimants . . ." *Ibid.*

<sup>12</sup> OHIO REV. CODE § 4121.02 states:

The industrial commission shall be composed of three members to be appointed by the governor with the advice and consent of the senate. Members shall be appointed for a term of six years. One of the appointees to the commission shall be a person who, on account of his previous vocation, employment, or affiliation, can be classed as a representative of employers, and one . . . shall be a person who . . . can be classified as a representative of employees. One of the appointees shall be a person who . . . can be classed as a representative of the public. Not more than two of the members of the commission shall belong to the same political party.

<sup>13</sup> *State ex rel. Funtash v. Industrial Comm'n*, 154 Ohio St. 497, 96 N.E.2d 593 (1951). See OHIO REV. CODE § 4121.13 for the powers of the industrial commission.

<sup>14</sup> OHIO REV. CODE § 4121.13(E) states the following concerning the industrial commission's power to make rules and regulations:

The industrial commission shall:

(E) Adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings which rules and regulations shall not be effective until ten days after their publication; a copy of such rules and regulations shall be delivered to every citizen making application therefor, and a copy delivered with every notice of hearing . . .

workmen's compensation.<sup>15</sup> The intermediate administrative body is composed of three-man, regional boards of review to which are delegated the "powers and authorities which are vested in the industrial commission,"<sup>16</sup> subject to the right of the industrial commission to review the action. Each of these administrative levels, the administrator, the boards of review, and the highest body, the industrial commission, is empowered with the right to hear and decide claims filed in accordance with the Workmen's Compensation Act.

## II. ADMINISTRATIVE APPEALS

### A. *Institution of Claim — Filing of Application*

The industrial commission is required to adopt reasonable and proper rules as to forms required in the filing of applications for workmen's compensation benefits.<sup>17</sup> After filing a claim, the Workmen's Compensation Act provides that before granting or denying an award in a disputed claim, the administrator of the bureau, or one of his deputies, must afford to the claimant and the employer an opportunity to be heard upon reasonable notice of hearing and to present testimony and facts pertinent to the claim.<sup>18</sup> From an unfavorable decision, the claimant or the employer may appeal to another administrative division as provided in the act.

### B. *Application for Reconsideration*

The Workmen's Compensation Act provides that within ten days from the date of receipt of the decision of the administrator or deputy administrator, the claimant or the employer may file with the administrator an application for reconsideration of the decision.<sup>19</sup> If such application is granted,<sup>20</sup> the administrator is required to give both parties the right to be heard and present pertinent testimony and facts.<sup>21</sup> The statutory time is strictly adhered to; if the ten day

<sup>15</sup> OHIO REV. CODE § 4121.12. This section was held to be constitutional in *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 138 N.E.2d 660 (1956).

<sup>16</sup> OHIO REV. CODE § 4123.14. The requirements of the members of the boards of review are the same as those of the industrial commission. See note 12 *supra*.

<sup>17</sup> OHIO REV. CODE § 4123.05.

<sup>18</sup> OHIO REV. CODE § 4123.515.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* See RULES GOVERNING CLAIMS PROCEDURES BEFORE THE BUREAU OF WORKMEN'S COMPENSATION — BOARDS OF REVIEW — THE INDUSTRIAL COMMISSION OF OHIO 18(D) (1964) [hereinafter cited as RULE].

<sup>21</sup> It is interesting to note that the administrator is permitted to grant or deny reconsideration hearings, based on his own discretion, but the higher administrative body, the board of review, does not have this type of discretion. See *State ex rel. Federated Dep't Stores, Inc. v. Brown*, 165 Ohio St. 521, 138 N.E.2d 248 (1956).

period passes and no application is filed, the administrator is without jurisdiction to consider the claim at a later filing of such application.

In practice, the application for reconsideration is not regularly used in that the rules of the industrial commission require that the reconsideration hearing be conducted in Columbus.<sup>22</sup> In many cases this may impose a hardship on the claimant and/or the employer as well as witnesses.<sup>23</sup>

### C. *Appeals to the Regional Boards of Review*

A party dissatisfied with either the administrator's decision on the merits or the decision on an application for reconsideration can appeal to the regional boards of review.<sup>24</sup> Such an appeal is perfected by filing a notice of appeal with the administrator, regional board of review, or industrial commission within twenty days (1) after date of receipt of the original decision of the administrator if no application for reconsideration is filed; or, (2) after notice of the denial by the administrator of an application for reconsideration; or, (3) after notice of the decision of the administrator upon reconsideration.<sup>25</sup> The industrial commission then assigns the case for hearing before the board which is most convenient for the claimant, and notifies the administrator, the claimant, and the employer of such assignment.<sup>26</sup> It is interesting to note that provision is made to allow the administrator to appeal an unfavorable decision of a board of review to the commission.<sup>27</sup> Such a procedure seems to make the administrator a party with a vested interest in the outcome of the dispute. If he has the power to hear the case originally and later to appeal any reversal, he seems to carry on two contradictory roles; a quasi-judicial officer and a statutory party to the proceedings.<sup>28</sup>

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<sup>22</sup> RULE 18. (D).

<sup>23</sup> RULE 9 (B) (2) provides that one can present proof by affidavit, deposition, written statement, or written document. This provision reduces the hardship which occurs when witnesses are forced to travel to Columbus to attend hearings.

<sup>24</sup> OHIO REV. CODE § 4123.516. In actual practice the initial decision is that of the deputy administrator and not the administrator. The motion for reconsideration is used to take the deputy's decision to the administrator for further examination.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> This is an unusual procedure for administrative agencies. The usual practice is that the investigation is done by one division and the adjudication by another. The examiner in the adjudication department does not have the power to appeal a reversal of his find. See generally DAVIS, ADMINISTRATIVE LAW TEXT §§ 10.03-.04 (1959).

While the boards of review are vested with the power and authority possessed by the industrial commission,<sup>29</sup> they are not given the power to refuse to hear a case. In *State ex. rel. Federated Dep't Stores, Inc. v. Brown*,<sup>30</sup> the supreme court held that the boards of review are under a mandatory duty to hear an appeal if properly perfected.<sup>31</sup>

While no cases have declared what constitutes an appeal "properly perfected," the statutory requirements are that the notice of appeal shall "state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom."<sup>32</sup> The statute also states that the appeal must be filed within twenty days after the date of receipt of the notice of the last hearing.<sup>33</sup> The industrial commission in Rule 18(A)<sup>34</sup> declared that appeals must be either on a prepared form or be a written statement from an aggrieved party which meets the requirements set up by law. There is no statutory and practically no case law which would indicate what effect the failure to comply with the requirements of Rule 18 (A) would have on the allowance of an appeal. One can argue by analogy that such mistakes would be governed by the same rules which bind the common pleas courts when an appellant errs in filing an appeal in a workmen's compensation case. This area of

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<sup>29</sup> OHIO REV. CODE § 4123.14 states:

Each member shall devote full time to his duties as a member of the board. The powers and authorities which are vested in the industrial commission in Chapter 4123 of the Revised Code may be exercised by a regional board of review or a member thereof to the extent necessary for the discharge of the duties of such board or its members.

<sup>30</sup> 165 Ohio St. 521, 138 N.E.2d 248 (1956).

<sup>31</sup> The case is not entirely clear in its holding. The court said that the board of review cannot refuse jurisdiction and if it does, such order is null and void. What the court apparently meant is that if the jurisdiction of the board of review is properly laid, then the board cannot dismiss the appeal by refusing jurisdiction. If, however, the jurisdiction is not proper, the board can always refuse to hear the case.

<sup>32</sup> OHIO REV. CODE § 4123.516.

<sup>33</sup> *Ibid.* See RULE 18 (F).

<sup>34</sup> RULE 18 (A) states:

Applications to the Administrator for reconsideration . . . should be made on Form C-88. Applications to the board of review . . . and applications to the Commission . . . should be made on Form I-12. In lieu of such specified forms, the Bureau, Board or Commission will accept a written statement from an aggrieved party as an appeal provided the statement is filed within the time specified by law and provided it contains the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals . . . .

See also YOUNG, WORKMEN'S COMPENSATION LAW OF OHIO 281, 284 (1963).

mistakes in appeals to court, which will be discussed later,<sup>35</sup> is notably clear in that the common pleas courts follow the requirements strictly. One certainly can argue, however, that the administrative appeals section, like other sections of the act, should be construed liberally as the statutes and the Ohio Supreme Court have frequently pointed out.<sup>36</sup> It seems most likely that in future cases in this area the industrial commission may well make its own rules without regard to the decisions of the common pleas court on what constitutes a properly perfected administrative appeal.

#### D. Appeals Before the Industrial Commission

A claimant, employer, or the administrator, who is dissatisfied with a decision of the regional board of review, can make application for an appeal to the industrial commission.<sup>37</sup> Such a party has twenty days after receipt of the notice of findings to perfect such an appeal.<sup>38</sup> The notices of findings are sent to the employer, employee, and other interested parties by first class mail or by certified mail. On occasion, these notices have failed to reach a party who would otherwise have appealed. In the 1959 act,<sup>39</sup> a provision was added to the law which provided that a person who did not receive the notice of findings due to a cause beyond his control, and who did not have actual knowledge of the import of the information in the notice, could have an additional twenty days after the industrial commission's finding that he had shown cause for additional time to appeal.<sup>40</sup>

Under the statute and the industrial commission rules, an application for an appeal is submitted to the commission to determine whether such application should be allowed or denied.<sup>41</sup> Failure of the appellant to supplement the application with a summary of the

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<sup>35</sup> See text accompanying notes 89-95 *infra*.

<sup>36</sup> *E.g.*, *Roma v. Industrial Comm'n*, 97 Ohio St. 247, 119 N.E. 461 (1918); *State ex rel. Brown v. Industrial Comm'n*, 28 Ohio L. Abs. 513 (Ct. App. 1939); *Klein v. B. F. Goodrich Co.*, 104 N.E.2d 90 (Ohio C.P. 1952). See OHIO REV. CODE § 4123.95 which states: "Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be construed liberally in favor of employees and the dependents of deceased employees." A case which seems to support this proposition of liberal interpretation in administrative appeals is *State ex rel. McMillan v. Dickerson*, 172 Ohio St. 288, 175 N.E.2d 176 (1961).

<sup>37</sup> OHIO REV. CODE § 4123.516.

<sup>38</sup> *Ibid.* See RULE 18 (F).

<sup>39</sup> OHIO REV. CODE § 4123.522.

<sup>40</sup> See Schroeder, *Legislative Amendments to Ohio Workmen's Compensation in 1959*, 20 OHIO ST. L.J. 601, 608 (1959).

<sup>41</sup> OHIO REV. CODE § 4123.516; RULE 18 (F).



relevant evidence or applicable legal authorities is considered to be good cause for a denial of the appeal.<sup>42</sup> Whether the appeal is allowed or disallowed, the employee, employer, and the administrator are all notified; if allowed, the order includes the time and place for the hearing to consider the merits of the appeal.<sup>43</sup>

Hearings before the industrial commission are always held in Columbus after proper notification of all interested parties. One of the assistants to the attorney general normally represents the administrator at this hearing.<sup>44</sup>

The courts have held that the industrial commission does not sit as an ordinary trial court, and that its proceedings, in the case of claims payable out of the state fund, are not adversary in nature. The claimant in such a case is not an antagonist, but is a ward of the industrial commission.<sup>45</sup> If this is true, one can only wonder why the administrator, who is nothing more than the administrative arm of the industrial commission, has a right to be represented by the attorney general. In practice, with the employer attempting to prevent allowance of a claim, the employee trying to collect compensation, and the administrator presumably protecting the fund, it is difficult to imagine how such a proceeding can often be anything but "antagonistic."

Under an earlier statute,<sup>46</sup> the industrial commission was subject to a series of rules concerning its decisions. It was held that once a decision was made, a presumption arose that the ruling was intended to dispose of all the issues raised in the claim.<sup>47</sup> In addition, the courts clearly held that the commission in considering a matter within its jurisdiction had the duty to pass definitely and specifically upon every issue raised in the claim which was necessary for a proper and complete decision.<sup>48</sup> If the commission denied the claimant the right to receive compensation or to continue to receive compensation, its order had to state the grounds upon which the

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<sup>42</sup> RULE 18 (F).

<sup>43</sup> *Ibid.*

<sup>44</sup> OHIO REV. CODE § 4123.519.

<sup>45</sup> *Miles v. Electric Auto-Lite Co.*, 133 Ohio St. 613, 15 N.E.2d 532 (1938); *Industrial Comm'n v. Collela*, 17 Ohio App. 301 (1923).

<sup>46</sup> 125 Ohio Laws 1016 (1953).

<sup>47</sup> *Brown v. Ternstedt Div. of Gen. Motors Corp.*, 128 N.E.2d 523 (Ohio Ct. App. 1954).

<sup>48</sup> *State ex rel. Morand v. Industrial Comm'n*, 141 Ohio St. 252, 47 N.E.2d 772 (1943); *State ex rel. Moore v. Industrial Comm'n*, 141 Ohio St. 241, 47 N.E.2d 767 (1943).

claim was denied.<sup>49</sup> The only exception to the above rule arose when the industrial commission found that it had no jurisdictional authority to inquire into the extent of disability or into the amount of compensation.<sup>50</sup>

None of the above rules are included in the present statute governing the powers and duties of the industrial commission. One could argue, however, that these rules of law are still valid and applicable. To add impetus to this argument, one need only look to the recent Ohio Court of Appeals decision in *Sands v. Young*,<sup>51</sup> where the court decided a problem which arose because the legislature failed to cover certain areas in a new statute. The court used cases decided under repealed statutes to fill in the ambiguous and unclear areas. Old decisions might also be used if a party were to bring a mandamus action asking the industrial commission to carry out a function which is necessary for proper adjudication but not provided for in the present statute. It is certainly possible that a court might base a ruling on the older cases which defined the industrial commission's duties under an earlier statute.

After the hearing before the industrial commission, the commission reduces its order to writing and mails it to the designated parties.<sup>52</sup> The appellate procedure thereafter is set forth in section 4123.519 of the Ohio Revised Code.<sup>53</sup>

### *B. Direct Appeals to Administrative Levels*

After an adverse decision from the administrator or one of his deputy administrators, the claimant can either appeal to the administrator for reconsideration as discussed above,<sup>54</sup> or directly to the regional board of review, bypassing the administrator.<sup>55</sup> This distinction becomes important when one compares the filing times for appeals. The application for reconsideration must be filed within ten days of receipt of notice<sup>56</sup> while the appeal to the regional board

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<sup>49</sup> *Ibid.*

<sup>50</sup> *Humphries v. Wheeling Steel Corp.*, 132 Ohio St. 263, 7 N.E.2d 230 (1937).

<sup>51</sup> 2 Ohio App. 2d 74, 206 N.E.2d 570 (1965).

<sup>52</sup> OHIO REV. CODE § 4123.516. See also REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION PROGRAM, WORKMEN'S COMPENSATION CONFERENCE 154 (1964).

<sup>53</sup> OHIO REV. CODE § 4123.519. See REFERENCE MANUAL, *op. cit. supra* note 52, at 154.

<sup>54</sup> See text accompanying notes 20-23 *supra*.

<sup>55</sup> OHIO REV. CODE § 4123.516.

<sup>56</sup> OHIO REV. CODE § 4123.515.

of review may be perfected in twenty days.<sup>57</sup> Thus, the claimant who negligently misses the ten day limitation is allowed an additional ten days to file an appeal to the board of review. If the claimant files for reconsideration and it is denied, he can elect to file an appeal to the regional board of review within twenty days<sup>58</sup> of receipt of notice of such denial, or to appeal directly to court within sixty days<sup>59</sup> of such notice.

The claimant who receives an adverse decision from the board of review again has two routes of appeal. He can, within twenty days, appeal to the industrial commission<sup>60</sup> or, within sixty days, to court.<sup>61</sup> With the claimant being given the alternative of appealing directly to a court at any time after the adverse decision at the administrator's reconsideration hearing, he can bypass the lengthy administrative procedure when: (1) one of the shorter appeal periods has elapsed; (2) the law is against him and he wants to seek an opportunity in the courts to test it; (3) he wishes to take advantage of the rules of evidence accorded the parties in a court action; or (4) he knows the case will eventually end up in court and wants to save time and money. The employer has the right to appeal to court only from a decision of the industrial commission or from a decision of a board of review if the commission refuses to hear an appeal.<sup>62</sup> It is interesting to note that the administrator, under the statute, does not have the power to appeal to court;<sup>63</sup> however, he may be a party if the employer or the claimant appeals.<sup>64</sup>

### III. APPEALS TO COURT

Article 1, section 16 of the Ohio Constitution provides that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due

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<sup>57</sup> OHIO REV. CODE § 4123.416.

<sup>58</sup> *Ibid.*

<sup>59</sup> OHIO REV. CODE § 4123.519.

<sup>60</sup> OHIO REV. CODE § 4123.516.

<sup>61</sup> OHIO REV. CODE § 4123.519. According to OHIO REV. CODE § 4123.517, a pre-hearing can be ordered by either or any of the hearing boards or commissions.

<sup>62</sup> OHIO REV. CODE § 4123.519.

<sup>63</sup> *Ibid.* The statute clearly declares that "the claimant or the employer may appeal a decision . . ." *Ibid.*

<sup>64</sup> *Ibid.* "The administrator of the bureau of workmen's compensation, the claimant and the employer shall be parties to such appeal . . ." The statute further provides that the attorney general or one of his assistants or special counsel designated by him shall represent the administrator and the commission. *Ibid.*

course of law, and shall have justice administered without denial or delay."<sup>65</sup> A new section was added in 1912 which states that "suits may be brought against the state, in such courts and in such manner as may be provided by law."<sup>66</sup> It was decided at an early date that this amendment was not self-executing.<sup>67</sup> Thus, it was clear that in order for a claimant to appeal a case to court, the procedure for effecting such appeal would have to be provided by statute. In *Hovanec v. Scanlon*,<sup>68</sup> an Ohio court of appeals held that a plaintiff in a workmen's compensation case has no inherent right to appeal to court. "The right is purely statutory, and the statute conferring the right must be construed and enforced strictly."<sup>69</sup>

Since the Ohio courts have adhered so adamantly to the rule that appeal to court in workmen's compensation cases is controlled by statute and not by any overriding constitutional right, it becomes necessary to examine the statutory provisions on appeals to the courts.

#### A. History of Statutes Permitting Appeals to Court

The first compensation law allowed injured employees to appeal to the court of common pleas on any decision which denied them a right to collect workmen's compensation benefits.<sup>70</sup> Such an action was conducted under the rules of civil procedure and was treated as a trial de novo.<sup>71</sup> In 1921, the legislature limited the admissible evidence to the facts in the record of the industrial commission;<sup>72</sup> and later the evidence was limited to the facts found at a newly created rehearing procedure.<sup>73</sup> In 1955, the legislature, in an attempt to streamline the procedure, eliminated the above-mentioned evidentiary restrictions and reinstituted a de novo proceeding. This legislation also, for the first time, provided a method whereby the employer could appeal adverse decisions to court.<sup>74</sup>

The venue provision of the present statute allows appeals to be

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<sup>65</sup> OHIO CONST. art. VIII, § 7 (1802).

<sup>66</sup> OHIO CONST. art. I, § 16.

<sup>67</sup> *Palumbo v. Industrial Comm'n*, 140 Ohio St. 54, 42 N.E.2d 766 (1942).

<sup>68</sup> 152 N.E.2d 697 (Ohio Ct. App. 1957).

<sup>69</sup> *Id.* at 700. *Accord*, *American Restaurant & Lunch Co. v. Glander*, 147 Ohio St. 147, 70 N.E.2d 93 (1946) (tax board of appeals).

<sup>70</sup> 102 Ohio Laws 524 (1911).

<sup>71</sup> *Ibid.*

<sup>72</sup> 109 Ohio Laws 291 (1921).

<sup>73</sup> 111 Ohio Laws 218 (1925).

<sup>74</sup> 126 Ohio Laws 1015 (1955).

taken to the court of common pleas in the county where the injury occurred or if it occurred out of the state, in the county where the contract of hire was made.<sup>75</sup>

*B. Who Can Appeal to Court*

Under the present statute,<sup>76</sup> the claimant, or if he has been killed, his widow, dependent children, or other alleged dependents can appeal to the court of common pleas. This same statute also provides the employer an appeal to the courts. There seems, however, to be one exception to this rule. In *Suez Co. v. Young*,<sup>77</sup> the court of appeals held that an employer who has been found to be amenable but who has failed to comply with the act by not paying premiums into the state fund, which is required by law, is not afforded the benefits of the appeal section of the Workmen's Compensation Act. However, the court carefully reasoned that this employer is not left without a remedy in the courts. He can refuse to pay the award and when he is sued by the attorney general on behalf of the employee, as provided in section 4123.75 of the Ohio Revised Code, he can raise as defenses any issue which he could have raised had he been allowed to take an appeal.

A question arises as to whether a funeral director or a doctor can file a claim for expenses incurred in the services rendered to the injured or deceased workman and appeal decisions adverse to him. Under an early case, the court held that one who is not a dependent and who pays the funeral expenses of a deceased workman is a mere volunteer and cannot be reimbursed for funeral expenses.<sup>78</sup> This case, however, is distinguishable in that the volunteer was a relative of the deceased and was not under a contract of hire as would be the case in services rendered by a doctor or funeral director.

In section 4123.59 (A), the legislature may have opened the door to allowing these parties to file for payment of their expenses. This section provides: "if there are no dependents the disbursements from the state insurance fund shall be limited to the expenses provided for in section 4123.66 of the Revised Code."<sup>79</sup> Section 4123.54 and .66 provide that the industrial commission shall pay such amounts as it deems necessary for medical and funeral ex-

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<sup>75</sup> OHIO REV. CODE § 4123.519.

<sup>76</sup> *Ibid.*

<sup>77</sup> 118 Ohio App. 415, 195 N.E.2d 117 (1963).

<sup>78</sup> *Industrial Comm'n v. Puttman*, 126 Ohio St. 8, 183 N.E. 788 (1932). See *YOUNG, op. cit. supra* note 34, § 7.45. The decision in this case has been rendered ineffective by OHIO REV. CODE § 4123.66.

<sup>79</sup> OHIO REV. CODE § 4123.59 (A).

penses. They state further that the industrial commission shall reimburse anyone who pays the funeral expenses.<sup>80</sup> Under the industrial commission rules for death claims, where "there are no dependents, application for the payment of funeral expenses may be made by the volunteer paying the funeral bill or the employer."<sup>81</sup> Although the above rule does not expressly give the doctor a right to file an application for payment for his services, certainly one could argue that since he has the legal right to be paid, there should be some procedure whereby he can file for his expenses.

The question still remains as to whether these parties can appeal to the appellate administrative levels as well as to court. Section 4123.519 states that the "claimant or the employer may appeal the decision of the industrial commission . . . ." Unless one can argue that "claimant" is anyone claiming benefits as opposed to the usual definition of the claimant as the injured employee or his dependent, it would seem that no appeal would lie.

### *C. Requirements for a Court Appeal*

The Workmen's Compensation Act formerly specified the ten grounds on which a court appeal would lie, and excluded all others.<sup>82</sup> The present provisions which provide for appeals to common pleas court are very broad, permitting all decisions except those as to the extent of disability to be reviewed by the courts, provided the appeals meet the statutory requirements.<sup>83</sup> Failure of the appellant to meet these requirements results in depriving the court of jurisdiction to hear the case, thus rendering the decision of the industrial commission or other administrative level final.<sup>84</sup> The first requirement is that of proper venue; the appeal must be filed in the county where the injury occurred or if the injury occurred out of the state, the county where the contract of hire was made.<sup>85</sup> The time limitation for the filing of the appeal is set at sixty days after receipt of notice of the decision of the administrative agency.<sup>86</sup> Notice of the appeal must be filed by the appellant with the commission and with the court.<sup>87</sup> The claimant then must within thirty days file a petition

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<sup>80</sup> OHIO REV. CODE §§ 4123.59, .66.

<sup>81</sup> RULE 8 (A) (7).

<sup>82</sup> 125 Ohio Laws 903 (1953).

<sup>83</sup> OHIO REV. CODE § 4123.519.

<sup>84</sup> *Starr v. Young*, 172 Ohio St. 317, 175 N.E.2d 514 (1961).

<sup>85</sup> OHIO REV. CODE § 4123.519.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

with the court stating the basis of the jurisdiction of the court and setting forth the issues.<sup>88</sup>

Two requirements, namely the form of the appeal and the requirements of the court petition, are subject to some problems and are worthy of careful consideration.

(1) *Form of the appeal.*—The statute states that the "notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom."<sup>89</sup> The Ohio Supreme Court has held that this section is mandatory and that it must be strictly complied with.<sup>90</sup> In *Starr v. Young*,<sup>91</sup> the court held that where the claimant failed to state the claim number and to designate which of the parties was the employer, the appeal was defective, and the court had no jurisdiction to hear it.<sup>92</sup>

The latest case in this area, *Singer Sewing Machine v. Pucket*,<sup>93</sup> which carefully distinguished *Starr*, has apparently relaxed the rule with regard to the accuracy of the date of decision. The court stated:

A notice of appeal which in its body names and designates the parties as employer and claimant, states the claim number, and correctly states that the appeal is from the decision of the industrial commission complies with the provisions of Section 4123.519, Revised Code, even though the date of decision stated therein was the date notice of such decision was mailed by the commission to the persons entitled to such notice.<sup>94</sup>

Thus, where the employer uses an erroneous date from which he appeals, he is not held to have committed a fatal defect which denies the court jurisdiction.

These two seemingly contradictory decisions may be reconciled by distinguishing the nature of the defect in each case. The *Starr* case involved a clear error of omission, whereas in the *Singer* case the employer simply made an error of commission in that the appeal merely set forth the date of mailing of decision rather than the date of hearing which was required. Support for this theory can be found in *American Lunch Co. v. Glander*,<sup>95</sup> a decision made

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Starr v. Young*, 172 Ohio St. 317, 175 N.E.2d 514 (1961).

<sup>91</sup> *Ibid.*

<sup>92</sup> This view was also upheld in *Parker v. Young*, 172 Ohio St. 464, 178 N.E.2d 798 (1961).

<sup>93</sup> 176 Ohio St. 32, 197 N.E.2d 353 (1964).

<sup>94</sup> *Id.* at 32, 197 N.E.2d at 354 (syllabus 1).

<sup>95</sup> 147 Ohio St. 147, 70 N.E.2d 93 (1946).

under a tax statute which provided that all appeal forms must have attached to them the copy of the order from which they appeal. The court held that the failure to attach the form was a fatal error of omission. Thus it would seem that one could argue that errors of omission are fatal while errors of commission are not.

(2) *Requirements of the court petition.*—The statute states that the "claimant shall, within thirty days after the filing of the notice of appeal, file a petition setting forth the basis for the jurisdiction of the court over the action and setting forth the issues."<sup>96</sup> Under this section, it would seem that the claimant has the burden of proving his case by filing a petition first, even though he is successful in the lower administrative hearings and the employer has filed the appeal.<sup>97</sup> Thus, it would appear to be a good strategic move on the part of the claimant-appellee to refuse to file the petition and hope the court dismisses the appeal for lack of jurisdiction.<sup>98</sup> This problem was discussed in the recent case of *Hanna Coal Co. v. Young*.<sup>99</sup> There the court held that where the employer files a notice of appeal and the claimant fails to file a petition, it is error for the court on the employers motion to summarily enter judgment against the claimant, where no pleadings were filed nor evidence taken. Instead the trial judge has broad discretionary authority to require the petition to be filed or, if he so desires, to entertain a motion for dismissal of the claim without prejudice. The court in *Hanna* seems to reject the earlier view<sup>100</sup> that the statutory provision makes the petition mandatory and that if the claimant refuses to file a petition, the court can consider the claim abandoned and upon pretrial enter an order denying the claimant a right to receive benefits from the fund.

Under Ohio Revised Code section 4123.519, the commission is required to notify all of the parties, other than the appellant, of the filing of the notice of appeal. However, if the commission fails to send to the claimant the notice of an appeal filed by the employer,

<sup>96</sup> OHIO REV. CODE § 4123.519. See *Columbia Chem. Co. v. Emmons*, 1 Ohio L. Abs. 200 (Ct. App. 1922). This case arose under the earlier procedure which provided for the filing of a petition by the claimant within a specified period after the filing of the appeal. The court held that for good cause it could extend the period of time. There would seem to be a good argument that this case might be applicable to OHIO REV. CODE § 4123.519.

<sup>97</sup> OHIO REV. CODE § 4123.519 states that the "claimant" shall file the petition. See generally *YOUNG, WORKMEN'S COMPENSATION LAW OF OHIO* § 11.18 (1963).

<sup>98</sup> There is also the possibility that the claimant might make an error in the petition which would be grounds for a dismissal.

<sup>99</sup> 1 Ohio App. 2d 230, 204 N.E.2d 399 (1965).

<sup>100</sup> *Keenan v. Young*, 179 N.E.2d 556 (Ohio C.P. 1961).



and as a result the claimant misses his thirty-day filing time for the petition, he might be in a very disadvantageous position. This is especially true if the court decides that under *Hanna*, the case should be dismissed.<sup>101</sup> The better view would seem to be that the court in these circumstances should order the claimant to submit the petition without applying any penalty.

Another problem concerning the provision requiring the claimant to file the petition is illustrated by the situation where the injured party has already received most of his award while the case was pending on appeal. This is possible in that section 4123.519 of the Ohio Revised Code provides that if the claimant receives the award from the highest administrative agency and the employer appeals, the award is not held up. In such a situation there would be little incentive for the claimant to file his petition.<sup>102</sup> As the law stands today, the claimant need not return this money; thus, the only reason to continue the action would be to determine who would be charged for the money already paid. If it is found that the claimant had a valid claim the employer's account would be charged; but if the claim was not valid, the surplus fund of the state would be charged for the claimant's award.<sup>103</sup>

The last problem in this area concerns whether the plaintiff's petition must also state a cause of action. The statute only requires that the petition set forth the basis for the jurisdiction of the court over the action and the issues in question.<sup>104</sup> The first time this question was raised was in *Keen v. General Motors Corp.*,<sup>105</sup> where under an earlier statute<sup>106</sup> which stated that the claimant need plead only jurisdiction, the court held that the petition need not state a cause of action. Soon after the *Keen* decision, the legislature passed the present act which requires that the issues, as well as jurisdiction, be raised in the petition. It was then felt by some that the legislature intended that a cause of action be pleaded in these appeals. However, in 1964, the court of appeals in *Mims v. Lennox-Haldeman Corp.*<sup>107</sup> held that the petition is employed for the purpose of setting forth the basis of the jurisdiction of the court over the action and setting forth the issues. This problem was

<sup>101</sup> See YOUNG, *op. cit. supra* note 97, at § 11.18.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

<sup>104</sup> OHIO REV. CODE § 4123.519.

<sup>105</sup> 152 N.E.2d 558, *aff'd on rehearing*, 153 N.E.2d 347 (Ohio C.P. 1958).

<sup>106</sup> 126 Ohio Laws 1026 (1955).

<sup>107</sup> 199 N.E.2d 20 (Ohio Ct. App. 1964), *appeal denied*, 177 Ohio St. 2d 180 (1964).

further complicated in *Sands v. Young*,<sup>108</sup> where the court said that all the petition need state is the ultimate issues. Thus, one certainly can argue that all that is required in a petition is a statement of the issues and jurisdiction and that one need not plead a cause of action. However, there is still a question in that the Ohio Supreme Court has never passed on this issue. Therefore, to be safe, it would seem that one should plead a cause of action just in case these lower court decisions are overruled.

#### D. Evidence

The present statute provides that "the court, or jury under the instruction of the court, if a jury is demanded, shall determine the right of the claimant to participate in the fund upon the evidence adduced at the hearing of such action."<sup>109</sup> This section has been construed to mean that the trial in common pleas court is a trial de novo, thus contemplating the right to a retrial on appeal of any evidence, provided such evidence is competent under the applicable rules in the trial of questions of fact in the court.<sup>110</sup>

It is now clear that the claimant on appeal to court has the affirmative of the issue. He must prove his right to participate or to continue to participate in the fund, and not only has the burden of proof, but also the burden of initially going forward with the evidence, even though he may be the appellee.<sup>111</sup> Under earlier statutes and case law, the claimant had to show a situation which brought him within the terms of the act,<sup>112</sup> and had to prove every essential element of his case by a preponderance of the evidence.<sup>113</sup> This included the burden of showing that the disability or death for which compensation was sought proximately resulted from a

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<sup>108</sup> 2 Ohio App. 2d 74, 206 N.E.2d 570 (1965).

<sup>109</sup> OHIO REV. CODE § 4123.519.

<sup>110</sup> *Smith v. Young*, 119 Ohio App. 176, 197 N.E.2d 835 (1963). This statute is considerably different from an earlier one (126 Ohio Laws 1036 (1955)) which stated that after the filing of an answer, the industrial commission was required, within a specified period after filing, to certify to the court a transcript of the record of the rehearing held before the commission. The claimant's right to recover benefits was to be determined only upon evidence contained in such record and on no other evidence. The court could exclude such evidence contained in the transcript as was not competent, material, or relevant if objection was made at the rehearing. *Lane Constr. Co. v. Industrial Comm'n*, 41 Ohio App. 169, 180 N.E. 659 (1931). Failure of the party to object at rehearing was a bar to further motions.

<sup>111</sup> *Swift & Co. v. Wreede*, 110 Ohio App. 252, 168 N.E.2d 757 (1959).

<sup>112</sup> *Reynolds v. Industrial Comm'n*, 145 Ohio St. 389, 61 N.E.2d 784 (1945).

<sup>113</sup> *Fox v. Industrial Comm'n*, 162 Ohio St. 569, 125 N.E.2d 1 (1955); *Industrial Comm'n v. Brubaker*, 129 Ohio St. 617, 196 N.E. 409 (1935); *State ex rel. Poulos v. Industrial Comm'n*, 128 Ohio St. 430, 191 N.E. 481 (1934).

compensable injury or disease,<sup>114</sup> and that the injury or casualty arose out of and in the course of the employment.<sup>115</sup> Since the present statute does not state what elements must be proven, it can be effectively argued that these cases are still good law and that the claimant still has the burden of proving these essential elements.

When the evidence produced furnishes, at best, only a possibility of the existence of the essential elements of the case rather than a probability thereof, the burden of proof has not been sustained.<sup>116</sup>

A question arises as to what procedure should be followed after the claimant's petition has been filed. The 1957 act stated that "further *proceedings* shall be had in accordance with the rules of civil procedure . . ." The present act provides that "further *pleadings* shall be had in accordance with the rules of civil procedure . . ."<sup>117</sup> However, the present act makes no mention as to the procedure to be used in court. But, since the courts have held this to be a *de novo* case, it would seem that the trial is to follow the procedure used in a common pleas court proceeding.

#### E. *What constitutes an appealable order*

The appeals statute allows an appeal in any injury case other than a decision as to the extent of disability.<sup>118</sup> Thus, a finding of the industrial commission that the claimant is not permanently and totally disabled is an extent-of-disability decision, and as such cannot be appealed to court.<sup>119</sup> A finding that the claimant is permanently and totally disabled but that the disability is not the result of the injury is a ruling on jurisdiction which is considered an appealable order.<sup>120</sup> A finding that an injury is not the proximate cause of a disabling condition is always an appealable issue.<sup>121</sup> A question arises in a case where the claim is for total dependency of a dependent survivor and the commission finds partial depend-

<sup>114</sup> *Fox v. Industrial Comm'n*, *supra* note 113; *Industrial Comm'n v. Brubacker*, *supra* note 113; *Weaver v. Industrial Comm'n*, 127 Ohio St. 18, 186 N.E. 618 (1933).

<sup>115</sup> *Fox v. Industrial Comm'n*, 162 Ohio St. 569, 125 N.E.2d 1 (1955); *Industrial Comm'n v. Lambert*, 126 Ohio St. 501, 186 N.E. 89 (1933).

<sup>116</sup> *Gerich v. Republic Steel Corp.*, 153 Ohio St. 463, 92 N.E.2d 393 (1950); *Stevens v. Industrial Comm'n*, 145 Ohio St. 198, 61 N.E.2d 198 (1945).

<sup>117</sup> Compare 127 Ohio Laws 901 (1957), with OHIO REV. CODE § 4123.519. (Emphasis added).

<sup>118</sup> OHIO REV. CODE § 4123.519.

<sup>119</sup> *Frank v. Youngstown Sheet & Tube Co.*, 152 N.E.2d 708 (Ohio Ct. App. 1956).

<sup>120</sup> *Wentzell v. Columbus Bolt & Forging Co.*, 112 Ohio App. 552, 176 N.E.2d 866 (1961).

<sup>121</sup> *E.g.*, *Carpenter v. Scanlon*, 168 Ohio St. 139, 151 N.E.2d 561 (1958).

ency. In *Berry v. Young*,<sup>122</sup> the court held that the claimant may appeal the commission's determination of partial dependency on the ground that the award should have been based upon total dependency.<sup>123</sup>

The courts have been very clear on the point that no appeal to court will be allowed in occupational diseases.<sup>124</sup> The rationale for this approach seems to be that the statute,<sup>125</sup> while it allows appeals to court in injury cases, does not specifically mention that occupational diseases are appealable. In *Johnson v. Industrial Comm'n*,<sup>126</sup> the court said that the terms "injury" and "disease" as used in the constitution are not synonymous.<sup>127</sup> Thus no appeal has been allowed in occupational disease cases. But in order to protect either party against unreasonable rulings, a mandamus action is allowed in occupational diseases if the claimant can show that there was an abuse of discretion or failure to comply with the law.<sup>128</sup>

#### IV. CONCLUSION

With the ever growing number of new workmen's compensation cases filed every year, a special interest has grown in this very specialized administrative area. As with any administrative body, the injured party has a right to some court supervision. In Ohio, the claimant and the employer have a constitutional right to have a case reviewed by the courts provided the legislature has set forth the necessary procedure. The Workmen's Compensation Act permits three administrative appeals and an appeal to court, provided the party meets the necessary statutory requirements and has received an order which is considered to be appealable. But even under this complete and complex statute certain areas are unclear and confusing. It is hoped that in the near future these problems can be resolved.

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<sup>122</sup> 178 N.E.2d 112 (Ohio C. P. 1961).

<sup>123</sup> *Ibid.*

<sup>124</sup> *Szekely v. Young*, 174 Ohio St. 213, 188 N.E.2d 424 (1963).

<sup>125</sup> OHIO REV. CODE § 4123.519.

<sup>126</sup> 164 Ohio St. 297, 130 N.E.2d 807 (1955).

<sup>127</sup> OHIO CONST. art. II, § 35.

<sup>128</sup> See *State ex rel. Jonah v. Beall*, 136 Ohio St. 213, 24 N.E.2d 826 (1940); *State ex rel. Industrial Comm'n v. Holt*, 134 Ohio St. 25, 15 N.E.2d 543 (1938); *State ex rel. Fulton Foundry v. Industrial Comm'n*, 153 N.E.2d 711 (Ohio Ct. App. 1957), *aff'd*, 168 Ohio St. 410, 155 N.E.2d 898 (1959).